

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60490

FILE: B-184323

DATE: February 9, 1976

MATTER OF: Midwest Tele Communications Corporation

099241
99349
99135

DIGEST:

1. Where prime contractor, although acting as independent contractor and not as agent for Government and without any Government participation, procures system for installation in Government-owned plant and title to property vests in Government at time of delivery, sub-contract award is made "for" the Government and protest jurisdiction exists.
2. Where solicitation provision relied upon in rejecting bid was known to exist prior to bid opening, protest is untimely filed after bid opening (40 Fed. Reg. 17979 (1975)) and not for consideration.

Request for bids No. B5250-X was issued on March 25, 1975, by Day & Zimmerman, Inc., as the contractor-operator of the Government-owned Lone Star Army Ammunition Plant under United States Army Armament Command contract No. DAAA09-71-C-0289, for the procurement and installation of a closed circuit television system. The bid opening date, as amended, was May 29 at 2 p.m. The Midwest Tele Communications Corporation, which submitted a bid under its then corporate name - Video Electronic Systems, Inc. (Video), questions the rejection of its bid by the prime contractor.

The events leading to that rejection are as follows. Video, it would appear, at first mistakenly believed that bid submission was not required until Friday (May 30), rather than Thursday (May 29). Apparently discovering this error, Video attempted without success to contact the buyer the morning of May 29 to inquire if it might wire in its bid prices - Video seems to have believed that the Government's and the prime contractor's regulations did not provide for bid rejection on this basis - or whether the bid had to be actually delivered itself to the prime contractor by bid opening. These unsuccessful attempts made it impossible to physically deliver the bid itself on time, and, consequently, the bid prices were transmitted by telegram and telex. Besides containing these prices, the Video telex, which was received by the contracting officer prior to bid opening, contained the statement that the proposal package, drawings, and technical data to back up the prices were in the mail. These were received after bid opening. Because the request for bids contained the special note: "DO NOT PHONE OR WIRE YOUR QUOTATION," the prime contractor decided the Video bid could not be considered.

Video believes that no precedent exists for rejecting its bid prices merely because the request for bids contained the afore-quoted statement. Further, it is noted that nowhere in this language or elsewhere in the request for bids is it stated that a failure to follow this provision would cause bid rejection. In any event, the fault is felt to reside with the prime contractor because the absence of the buyer was the cause for the delay which necessitated the resort to the telex and telegram. Finally, inasmuch as the buyer was on leave the day of bid opening, no action was taken on the bids until the following week, and inasmuch as the decision as to which bidder should receive award was allegedly made solely on the basis of price, it is stated that no harm would result in considering the Video bid.

Concerning whether our Office has jurisdiction to rule on the matter, Video believes that it does since the Government will actually be the one paying for the procurement - with taxpayer funds - and, consequently, it is important to ensure that all parties to the procurement were treated fairly and equally to be sure that the Government receives the best item at the best price. It is also maintained that to permit the rejection of the Video bid by not exercising our jurisdiction would be unfair to Video in view of the money and the diligent effort put into the submission of a bid by that firm.

The Department of the Army does not believe that our Office should consider the immediate subcontract protest. In this connection, the Army points out that the contract between the Government and Day & Zimmerman provided under article E-2, SCOPE OF THE WORK, that:

"1. The Contractor, as an independent Contractor and not as an agent of the Government, shall furnish all personnel, labor, equipment, supplies, materials * * * and other services * * * sufficient and adequate to operate and maintain the Lone Star Army Ammunition Plant for the purpose therefore established * * *"

Article 1-6, SUBCONTRACTS, provided that under certain circumstances advance notification to the Government contracting officer of proposed placings of subcontracts would be required and that written consent of the contracting officer would be required before awards, where advance notification was necessary, could be made. Notwithstanding

these provisions, it was also provided that the consent of the contracting officer was not necessary for the above-mentioned subcontracts if the contracting officer "has approved in writing the Contractor's procurement system and the subcontract is within the scope of the approval." The contracting officer has, reportedly, approved the Day & Zimmerman procurement system for the provision of the supplies and services necessary for operation of the plant. Consequently, because the Government had no connection with the procurement and because Day & Zimmerman was acting as an independent contractor in procuring the system, it is believed that none of the bases under which we will consider protests against awards of subcontracts by prime contractors of the Government has been shown to exist.

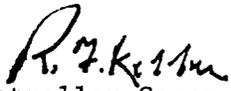
Our Office has consistently recognized that the contracting practices and procedures employed by prime contractors - who are normally acting merely as independent contractors - in the award of subcontracts are generally not subject to the statutory and regulatory requirements governing direct procurements of the Federal Government. 49 Comp. Gen. 668 (1970). While we have enunciated this general rule, even as regards subcontracts awarded under a prime contract which is of the cost-reimbursement type, we have stated that we will consider such protests under certain, limited circumstances: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the active or direct participation of the Government in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision. Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

We believe that we do have jurisdiction in this matter under exception (4) mentioned above. Notwithstanding the fact that the Government played no direct role in the subcontracting, the system was being purchased for installation in a Government-owned plant, and, as was stated in the Day & Zimmerman invitation, "THIS EQUIPMENT WILL BECOME THE PROPERTY OF THE UNITED STATES GOVERNMENT UPON DELIVERY." Thus, we believe the subcontract award would be made "for" the Government. 49 Comp. Gen. 668 (1970).

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However, we believe the protest to be untimely raised and, therefore, not for consideration. Our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)) require protests against matters apparent prior to bid opening to be protested prior to bid opening. It was apparent prior to bid opening that quotations were not to be submitted by wire, and yet Video did not protest this requirement until its quotation was rejected after bid opening. In any event, we have uniformly held that telegraphic bids, unless authorized by the invitation for bids, are not properly for consideration. 52 Comp. Gen. 281 (1972); Airflote, Incorporated, B-180425, July 18, 1974, 74-2 CPD 42.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States